

Exam:

Exam Form:

C2502 - Static Form

## Response

Mrs. Jamison,

This letter is regarding two legal questions you've asked our firm to answer regarding the unfortunate accident involving your husband. This first question is regarding sanctions that may be imposed on kSunrise as the result of the spoliation of evidence (ie the destroyed rung locks). We will likely be able to move the court to impose sanctions however, the court will likely not award a default judgment in your favor.

The controlling law in Columbia is *Brown v Wald*, where the court found that there was no bad faith on part of Wald and thus imposed the least severe sanction for the spoliation of the evidence (jury instruction that a presumption against Wald could be made). *Brown* dealt with a similar set of facts where important evidence was lost or destroyed before the opposing parties were able to inspect. In *Brown*, the court articulated the standard to analyze spoliation of evidence which is applicable in your case.

The court should seek to learn whether 1) there was prejudice as result of the spoliation, 2) whether the prejudice can it be cured, 3) how important was the evidence, 4) whether responsible party act in bad faith, and finally 5) whether there is potential for abuse if the testimony/evidence is not excluded.

The remedies range from most severe from dismissal, (if bad actor is plaintiff), default judgment (in favor of defendant), exclusion of expert testimony regarding the evidence, or jury instructions for a presumption against spoliator. Adverse jury instruction is least punitive.

Here, we cannot be certain whether you suffered prejudice as a result of the destroyed rung locks. The expert who tested them has over 20 years experience and his test results were inconclusive. Further, the testing performed on the rung locks necessarily caused them further damage which would make additional testing less reliable. Finally, there exists the possibility that the damage was caused by misuse which would not favor your legal position. This doesn't negate the importance of the evidence itself as it is quite important in proving a claim for manufacturing defect. Without the rung locks, you will have to argue that an accident like this does not occur "but for" a manufacturing defect on part of Sunrise. The fact that your husband had over 10 years of experience as a roofer and was one of the best, goes against the theory that he misused the ladder.

In *Brown*, the court put emphasis on the bad faith element and there is some evidence that Sunrise might have acted in bad faith. First, they did not ask Advance to preserve the rung locks. In fact, they explicitly told Advance to destroy them. While it is unclear whether Sunrise was aware that someone died on the ladder (Advance was unaware of this fact), there is a good argument to be made that Sunrise should have inquired about the accident or anticipated that the locks should be preserved for litigation purposes, though to be fair, Sunrise sent the locks on 3/25, a full month before the filing of this action.

We can and should advocate for a default judgment and argue that there is a strong potential for abuse should Sunrise avoid any meaningful sanction. As the *Brown* court articulated, "Sanctions for discovery abuses is intended to prevent prejudice. An award of default judgment only appropriate when lesser sanctions will not suffice or when there is bad faith".

The second question this letter seeks to address is whether you may bring an independent tort action against Advanced Testing based on its destruction of the rung locks?

The answer to this question is likely no. The controlling case that addresses this issue is *Zubul v Standard*. In *Zubul*, the court ruled that in Columbia, an independent tort action can arise from the spoliation of evidence (contrary to prior opinions), however there must be a finding that the party whom the claim is asserted against had an affirmative duty to preserve the evidence.

Here, we see no affirmative duty. The party to the action must establish the existence of some special relationship or obligation arising out of a statute, rule, contract, voluntary action, or similar circumstances.

Here, Advance had no knowledge of the accident that caused your husband's death. In deposition testimony, the declarant stated so. Although Advance does have a special relationship with Sunrise, this does not give rise to an affirmative duty on their part to preserve the evidence, especially since they were explicitly instructed to destroy the rung locks.

Finally, the court ruled that the third party spoiler (Advance) must have actual knowledge of the pending or imminent litigation.

Here, Advance didn't learn of the litigation until December when they were served with a subpoena. Unfortunately, the rung locks were destroyed in April, nearly eight months later.

Please be assured we intend to take all possible action against Sunrise to redress the sad and untimely death of your husband. While we may not get a default judgment against Sunrise, we are confident they will be sanctioned by the court which will help correct any prejudice arising from the destruction of the rung locks. Advance appears to be a good actor and neither sanctions or an independent tort action are appropriate at this time.

Respectfully,

Applicant

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The court should seek to learn whether 1) there was prejudice as result of the spoliation, 2) whether the prejudice can it be cured, 3) how important was the evidence, 4) whether responsible party act in bad faith, and finally 5) whether there is potential for abuse if the testimony/evidence is not excluded. The remedies range from most severe from dismissal, (if bad actor is plaintiff), default judgment (in favor of defendant), exclusion of expert testimony regarding the evidence, or jury instructions for a presumption against spoliator. Adverse jury instruction is least punitive. Here, we cannot be certain whether you suffered prejudice as a result of the destroyed rung locks. The expert who tested them has over 20 years experience and his test results were inconclusive. Further, the testing performed on the rung locks necessarily caused them further damage which would make additional testing less reliable. Finally, there exists the possibility that the damage was caused by misuse which would not favor your legal position. This doesn't negate the importance of the evidence itself as it is quite important in proving a claim for manufacturing defect. Without the rung locks, you will have to argue that an accident like this does not occur "but for" a manufacturing defect on part of Sunrise. The fact that your husband had over 10 years of experience as a roofer and was one of the best, goes against the theory that he misused the ladder. In *Brown*, the court put emphasis on the bad faith element and there is some evidence that Sunrise might have acted in bad faith. First, they did not ask Advance to preserve the rung locks. In fact, they explicitly told Advance to destroy them. While it is unclear whether Sunrise was aware that someone died on the ladder (Advance was unaware of this fact), there is a good argument to be made that Sunrise should have inquired about the accident or anticipated that the locks should be preserved for litigation purposes, though to be fair, Sunrise sent the locks on 3/25, a full month before the filing of this action. We can and should advocate for a default judgment and argue that there is a strong potential for abuse should Sunrise avoid any meaningful sanction. As the *Brown* court articulated, "Sanctions for discovery abuses is intended to prevent prejudice. An award of default judgment only appropriate when lesser sanctions will not suffice or when there is bad faith". Second, can she bring an independent tort action against Advanced Testing based on its destruction of the rung locks? In *Zubul v Standard*, the court ruled that in Columbia, an independent tort action can arise from the spoliation of evidence (contrary to prior opinions) however there must be a finding that the party whom the claim is asserted had an affirmative duty to preserve the evidence. The party to the action must establish the existence of some special relationship or obligation arising out of a statute, rule, contract, voluntary action or similar circumstances. Here, Advance had no knowledge of the accident that caused your husband's death. Although they do have a special relationship with Sunrise, this does not give rise to an affirmative duty on their part to preserve the evidence, especially since they were explicitly instructed to destroy the rung locks.